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Judgment of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 19th day of January, one thousand nine hundred and sixty-two.

Present: HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. PAUL R. HAYS
Circuit Judges.

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

v.

HOLLAND AMERICAN LINE,
Defendant-Appellee.

Filed February 28, 1962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court, for the Southern District of New York, and was argued by counsel.

On consideration thereof, it is now hereby ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 83—September Term, 1961.

(Argued November 17, 1961 Decided January 19, 1962.)

Docket No. 27077

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

against

HOLLAND-AMERICA LINE,
Defendant-Appellee.

Before:

MOORE, SMITH and HAYS,
Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, John M. Cashin, Judge, entered on an order granting defendant-appellee's motion for summary judgment.

Affirmed.

ELI ELLIS, New York, N. Y. (HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, J. P. CATUZZI, of counsel, New York, N. Y., on the brief), for plaintiffs-appellants.

JOHN J. CROWLEY, New York, N. Y. (BURLINGHAM, HUPPER & KENNEDY, FRANCIS I. FALLON, of counsel, New York, N. Y., on the brief), for defendant-appellee.

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

PER CURIAM:

Appellants, plaintiffs below, appeal from a decision of the district court granting summary judgment for appellee. This action which is predicated upon personal injuries sustained by Anne Geller on December 17, 1958, while a passenger on appellee's vessel, The SS. *Statendam*, was commenced on June 23, 1960. Since the Cruise Passage Contract (the Contract) between appellants and appellee contained a provison that suit for injuries sustained during the voyage must be brought within one year from the date of the injury, the district court held that appellants' suit was barred because it was not brought within the one-year limitation period.

Appellants contend that they are not bound by the limitation provision of the Contract unless it is shown that they had actual knowledge of its terms and that the collection of the ticket at embarkation negated appellee's right to enforce this provison. However, it is the settled law in this circuit that passengers will be bound by such a provison in the contract of carriage, if the provision is incorporated, at least by reference, in the body of the contract. *Foster* v. *Cunard White Star, Ltd.*, 2 Cir., 1941, 121 F. 2d 12; *Baron* v. *Compagnie Generale Transatlantique*, 2 Cir., 1939, 108 F. 2d 21; see also *Siegelman* v. *Cunard White Star, Ltd.*, 2d Cir., 1955, 221 F. 2d 189; *Schiebel* v. *Aguilines, Inc.*, 2d Cir. 1946, 156 F. 2d 636; *The Kungsholm*, 2d Cir., 1936, 86 F. 2d 703. This rule applies even though the ticket containing the contract is collected at the time of embarkation. See *Foster* v. *Cunard White Star, Ltd.*, *supra*. Since the limitation provison was incorporated by reference in the body of the contract, appellants were bound to institute their action within one year of the date of the injury and their failure to do so bars this suit.

The only other question presented by this appeal is whether there was a genuine issue of fact concerning the

receipt of the Contract by appellants which requires a trial. Appellee submitted an affidavit by Lawrence Levine, owner of the Ellenville Travel Service, in which he stated that he delivered the Contract to appellants. Appellants did not contradict this statement in any manner, but merely asserted that, since they had not opened the envelope that they received from Levine, they did not know whether or not they had received the Contract. This assertion by appellants was not sufficient to create a genuine issue of fact and, therefore, the motion for summary judgment was properly granted. E.g., *Dyer* v. *MacDougall*, 2d Cir., 1952, 201 F. 2d 265; *Reynolds* v. *Maples*, 5th Cir., 1954, 214 F. 2d 395; *Magee* v. *The Coca-Cola Co.*, 7th Cir., 1956, 232 F. 2d 596.

Affirmed.

Order of the United States Court of Appeals, for the Second Circuit, Dated February 23, 1962, Denying the Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

against

HOLLAND-AMERICA LINE,
Defendant-Appellee.

Before:

MOORE, SMITH and HAYS, C. JJ.

Petition for Rehearing.

Motion for rehearing denied.

LPM
JJS
PRH
U. S C. JJ.

February 23, 1962.